No. 80-743

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

SAMUEL SHAPIRO AND BELLA SHAPIRO, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners seek review of the decision of the court of appeals determining that it had no jurisdiction to hear their appeal from an interlocutory order of the Tax Court. Petitioners had asked the Tax Court to order the Commissioner of Internal Revenue to release assets seized after a jeopardy assessment so that the released funds could be used to pay attorneys' fees in contesting the underlying tax liability. The Tax Court denied the request,[1] and petitioners sought to

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[1]The Tax Court's denial of petitioners' request and its ruling that any claim of due process violation must await a decision on the merits (Pet. App. 9a-10a) is in accord with the position taken by the courts of appeals which have considered the question. *Avco Delta Corp. Canada, Ltd.* v. *United States*, 484 F. 2d 692, 706-707 (7th Cir. 1973); *Rosenblum* v. *United States*, 549 F. 2d 1140, 1146 (8th Cir.), cert. denied, 434 U.S. 818 (1977); *United States* v. *Marshall*, 526 F. 2d 1349, 1353-1354 (9th Cir. 1975); *Illinois Redi-Mix Corp.* v. *Coyle*, 360 F. 2d 848, 849-850 (7th Cir. 1966); *Lloyd* v. *Patterson*, 242 F. 2d 742, 744 (5th

take an immediate appeal prior to any determination of tax liability. Petitioners alleged jurisdiction under both Section 7482 of the Internal Revenue Code of 1954 (26 U.S.C.) and 28 U.S.C. 1292(b).[2] The court of appeals ruled that it had no jurisdiction under either provision (Pet. App. 2a-4a).

1. The courts of appeals correctly ruled that it lacked jurisdiction. Section 7482(a) of the Internal Revenue Code of 1954 confers jurisdiction upon the court of appeals "to review the decisions of the Tax Court." Section 7459(c) establishes the content of the term "decision" as "an order specifying the amount of the deficiency." Thus, the courts of appeals have jurisdiction to review only "decisions" of the Tax Court and not intermediate or interlocutory orders.[3] When Congress has determined to provide for the review of

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Cir. 1957); *United States* v. *Brodson*, 241 F. 2d 107, 109-111 (7th Cir.), cert. denied, 354 U.S. 911 (1957). The Tax Court's ruling is also in accord with this Court's admonitions that rulings on constitutional issues should not be made unless clearly unavoidable. *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582 (1979), and cases cited therein at n.22.

[2]The Tax Court purported to certify the question for an interlocutory appeal under 28 U.S.C. 1292(b) (Pet. App. 13a-14a).

[3]Michael v. *Commissioner*, 56 F. 2d 825 (2d Cir. 1932); *Ceco Steel Products Corp.* v. *Commissioner*, 150 F. 2d 698 (8th Cir. 1945); *Kiker* v. *Commissioner*, 218 F. 2d 389 (4th Cir. 1955); *Commissioner* v. *Smith Paper, Inc.*, 222 F. 2d 126 (1st Cir. 1955); *Commissioner* v. *S. Frieder & Sons*, 228 F. 2d 478 (3d Cir. 1955); *Handshoe* v. *Commissioner*, 252 F. 2d 328 (4th Cir. 1958); *Licavoli* v. *Commissioner*, 318 F. 2d 281 (6th Cir. 1963); *Porter* v. *Commissioner*, 453 F. 2d 1231 (5th Cir. 1972); *Ryan* v. *Commissioner*, 517 F. 2d 13 (7th Cir.), cert. denied, 423 U.S. 892 (1975); *W. W. Windle Co.* v. *Commissioner*, 550 F. 2d 43, 45 (1st Cir.), cert. denied, 431 U.S. 966 (1977); *Wilson* v. *Commissioner*, 564 F. 2d 1317 (9th Cir. 1977). See also 9 J. Mertens, *Law of Federal Income Taxation* § 51.13 (1977 rev.).

Petitioners claim (Pet. 14) that *Louisville Builders Supply Co.* v. *Commissioner*, 294 F. 2d 333 (6th Cir. 1961), deviates from this consistent line of authority. But that case did not involve a petition for the redetermination of a deficiency by the Tax Court. Rather, the court of

a Tax Court action which does not satisfy Section 7459(c), it has stated that the action shall be considered to be a decision or shall be reviewable as such.[4] Since the order of the Tax Court considered below was not a "decision," the court of appeals correctly determined that it had no appellate jurisdiction under Section 7482 with respect to that order.

2. In seeking to avoid the limitations upon review of Tax Court orders other than decisions, petitioners invoke (Pet. 20) the so-called "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The "collateral order" doctrine has no relevance, however, for it relates to the finality of an order. The question here was whether the order was a decision reviewable under Section 7482, not whether it was final.

Moreover, even if the question here turned upon finality, the "collateral order" doctrine of the *Cohen* case would not

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appeals held in that case that a special proceeding was beyond the jurisdiction of the Tax Court, and therefore reviewable on that basis. However, in a subsequent case, the Sixth Circuit ruled in accordance with our submission, that it had no jurisdiction to review interlocutory orders of the Tax Court in the usual type of proceeding to redetermine a deficiency. See *Licavoli* v. *Commissioner, supra*; see also *W. W. Windle Co.* v. *Commissioner, supra*, 550 F. 2d at 45 n.1

[4] The 1954 Code assimilates other final dispositions of proceedings by the Tax Court to "decisions" as designated in Section 7459(c). Section 7459(d) provides that a decision dismissing a proceeding shall be considered a decision that the deficiency is the amount determined by the Secretary. Section 7459(e) provides that if assessment or collection is barred by the statute of limitations, a decision of the Tax Court to that effect shall be considered a decision that there is no deficiency. More recently, when the Tax Court has been given limited jurisdiction to make declarations with respect to charitable organizations (26 U.S.C. 7428), certain retirement plans (26 U.S.C. 7476), transfers of property from the United States (26 U.S.C. 7477), and the status of certain governmental obligations (26 U.S.C. (Supp. II) 7478), Congress has been careful in each instance to provide that such a declaration shall have the force and effect of a decision of the Tax Court, "and shall be

support petitioners' position. In *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978), this Court held that to come within the *Cohen* exception, a case must "be effectively unreviewable" on appeal from a final judgment. That condition is not met here (see page 1, note 1, *supra*). Any attempt to evaluate petitioners' due process claim prior to the actual deprivation of due process is a matter of complete speculation. Petitioners have been represented in the past without access to the assets seized under the jeopardy assessment and there is no reason to believe that such representation will cease. See, *e.g.*, *Commissioner* v. *Shapiro*, 424 U.S. 614 (1976). Only if and when petitioners actually suffer an arguable deprivation of due process will their claim be ripe for judicial consideration. It may then be reviewed on appeal from the "decision" of the Tax Court determining the amount of the deficiencies in their tax liabilities.

3. The court of appeals also correctly ruled that it had no jurisdiction under 28 U.S.C. 1292(b) to review the Tax Court's order. As the court of appeals stated (Pet. App. 2a):

> The language of § 1292(b) refers only to orders by a "district judge" and proceedings in a "district court," making no reference to orders of any other court. Moreover, Fed. R. App. P. 5, governing appeals from interlocutory orders under § 1292(b), also refers solely

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reviewable as such." See 26 U.S.C. 7428(a), 7476(a), 7477(a), and 26 U.S.C. (Supp. II) 7478(a).

If, in awarding the Tax Court a limited contempt power by virtue of Section 7456(d), Congress in 1969 failed to specify whether and how punishment for contempt might be reviewed, that failure has little bearing upon this case. Moreover, no question of jurisdiction other than mootness was raised in *Ryan* v. *Commissioner*, 568 F. 2d 531 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978), a contempt case relied upon by petitioners (Pet. 14-15).

to the "district court," and Rule 5 is expressly excluded from application to the Tax Court by Rule 14.

Petitioners (Pet. 13) suggest that Section 7482(a) incorporates 28 U.S.C. 1292(b), where the former states that courts of appeals have jurisdiction to review Tax Court decisions, "in the same manner and to the same extent" as district court decisions. But this argument is contrary to the only authority on the subject, *Commissioner* v. *Smith Paper, Inc.*, 222 F. 2d 126, 128 (1st Cir. 1955), and ignores the fact that 28 U.S.C. 1292(b) was enacted some ten years after the relevant portion of Section 7482(a). Accordingly, Congress could not have intended to incorporate Section 1292(b) in Section 7482 of the Internal Revenue Code (see Pet. App. 3a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
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DECEMBER 1980